

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of
VISIONARY RELATED ENTERTAINMENT,
LLC
For Renewal of License and License to Cover for
Station KAOI-FM
Wailuku, Hawaii
and
Station KNUQ(FM)
Paauilo, Hawaii
Facility ID No. 70375
File Nos. BRH-20051003CFK,
BLH-20090410ARC
Facility ID No. 15969
File Nos. BRH-20051003CFD,
BLH-20100119AAO

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2012

Released: February 8, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Media Bureau has before it the captioned applications of Visionary Related Entertainment, LLC ("Visionary"), for renewal of the licenses of Station KNUQ(FM), Paauilo, Hawaii, and Station KAOI-FM, Wailuku, Hawaii, and for licenses to cover the respective recently-modified stations. We also have before us a January 26, 2006, "Opposition" ("Objection") of the D.T. Fleming Arboretum ("Arboretum") and Martha Vockrodt-Moran ("Vockrodt-Moran") (collectively, "Objectors"), filed against both stations' license renewal applications. For the reasons set forth below, we grant the Objection to the extent indicated herein and otherwise deny, grant the renewal applications for the limited term of twelve (12) months from the release date of this letter, conditioned on Visionary's implementation of a radio frequency radiation ("RFR") training program, and grant the covering license applications.

II. BACKGROUND

2. Section 1.1310 of the Commission's Rules ("Rules") sets maximum permissible exposure ("MPE") levels of human exposure to RFR. The Rules provide for separate MPE limits for areas of

1 File Nos. BLH-20090410ARC ("KAOI-FM covering license application") and BLH-20100119AAO ("KNUQ(FM) covering license application").

2 Although the pleading is styled as an "Opposition," we will treat it as an informal objection. See 47 C.F.R. § 73.3587. On March 9, 2006, Visionary filed a response.

3 47 C.F.R. § 1.1310.

“occupational/controlled” exposure and areas for “general population/uncontrolled” exposure. Licensees can demonstrate compliance by restricting public access to areas where RFR exceeds the public MPE limits.<sup>4</sup>

3. KAOI-FM. Vockrodt-Moran is an employee of the Arboretum.<sup>5</sup> In January 2004, she contacted the Commission’s Honolulu Office because of concerns that the KAOI-FM tower site, located on property adjacent to the Arboretum, could expose Arboretum employees, guests and other persons in the area to harmful radiation.<sup>6</sup> She noted that there was no fencing around the tower, nor were there any warning signs, and that the antenna was mounted at a very low height, which could present additional radiation hazards.<sup>7</sup>

4. Agents from the Commission’s Honolulu Office inspected the KAOI-FM site on January 26, 2004, and found that the antenna height of radiation center above ground level was eleven meters shorter than its authorized height of 25 meters, in violation of Section 73.1690(c)(1) of the Rules.<sup>8</sup> The Honolulu Office issued a Notice of Violation to Visionary on February 26, 2004, affording it 20 days to respond.<sup>9</sup> The Notice of Violation did not address Vockrodt-Moran’s concerns regarding fencing or signage. On April 19, 2004, Visionary responded, explaining that the improper height of the antenna may have been caused by clerical errors and stating that it would take corrective action.<sup>10</sup>

5. On July 16, 2004, Visionary filed an application to modify the antenna height and to operate KAOI-FM at reduced power.<sup>11</sup> On October 20, 2004, Objectors collectively filed an Informal Objection, charging that Visionary had misrepresented certain facts about the KAOI-FM site in the modification application.<sup>12</sup> On the same day, Objectors filed a complaint against Visionary with the Commission, requesting that the Commission order Visionary to cease operations at the KAOI-FM site.<sup>13</sup> Acting on the complaint, Honolulu Office agents again visited the KAOI-FM site on November 17, 2004.<sup>14</sup> During the inspection, the agents observed no restrictive fencing around the tower and no RFR

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<sup>4</sup> See, e.g., *OET Bulletin 65*.

<sup>5</sup> Complaint of D.T. Fleming Arboretum and Martha Vockrodt-Moran at 1 (“Complaint”).

<sup>6</sup> Complaint at 1.

<sup>7</sup> *Id.* at 1-2.

<sup>8</sup> See Notice of Violation, File No. EB-03-HL-090 (“KAOI NOV”), citing 47 C.F.R § 73.1690 (providing that licensee may not change the height of an antenna more than 2 meters above or 4 meters below authorized values without prior authorization from the Commission).

<sup>9</sup> KAOI NOV at 1-2.

<sup>10</sup> Visionary Response to Notice of Violation at 1.

<sup>11</sup> File No. BPH-20040716ABZ. This application was subsequently dismissed on July 29, 2008, at Visionary’s request.

<sup>12</sup> See Informal Objection of D.T. Fleming Arboretum and Martha Vockrodt-Moran. This objection was dismissed when the modification application was dismissed. See n.11.

<sup>13</sup> See Complaint of D.T. Fleming Arboretum and Martha Vockrodt-Moran, filed on October 20, 2004.

<sup>14</sup> See *Visionary Related Entertainment, L.L.C.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 2005329860001 (EB, Western Region, Honolulu Resident Agent Office, released February 4, 2005) (“KAOI-FM NAL”).

warning signs posted.<sup>15</sup> Agents also measured RFR levels and determined that the facility exceeded the public RFR MPE limits in a twenty foot by ten foot rectangular area in front of the tower.<sup>16</sup>

6. In January 2005, Visionary informed the Honolulu Office that it had taken steps to correct the deficiencies discovered during the site inspection - specifically that it had constructed a fence around the tower, which would permit operation within RFR MPE limits.<sup>17</sup> Shortly thereafter, on February 4, 2005, the Commission's Honolulu Office issued a Notice of Apparent Liability for Forfeiture to Visionary for its violation of Section 1.1310 of the Rules by exceeding public RFR MPE limits at the site.<sup>18</sup>

7. On October 3, 2005, Visionary filed a renewal application for KAOI-FM. The Objectors oppose its grant, asserting that the transmitter site is still not in compliance with Section 1.1310 of the Rules and that there is no fencing around the site.<sup>19</sup> Attached to the Objection is a letter requesting that the Commission conduct an RF exposure survey of the Arboretum and verify that Visionary has sufficiently lowered the power level of KAOI-FM so that Arboretum property is not exposed to excessive RF levels.

8. Visionary subsequently filed an application to relocate the facility for KAOI-FM to a new site approximately 21 kilometers from its original location.<sup>20</sup> The staff granted this application on November 5, 2008, and Visionary thereafter filed the KAOI-FM covering license application, which included an RFR Engineering Statement, dated March 26, 2009, stating that: (1) measurements conducted at the new site revealed that RFR levels did not exceed the limits provided for in OET Bulletin 65; and (2) no location at the site is a danger to workers or the general public.<sup>21</sup> Visionary also requested Program Test Authority ("PTA") to operate from the new site. On April 29, 2009, the staff granted the PTA request.<sup>22</sup>

9. KNUQ(FM). Visionary filed the renewal application for KNUQ(FM) on October 3, 2005.<sup>23</sup> The Objectors oppose its grant, asserting that the transmitter site is not in compliance with Section 1.1310 of the Rules and permits public and worker access to areas of hazardous RFR levels.<sup>24</sup>

10. On April 9, 2008, agents from the Honolulu Office conducted an inspection of the KNUQ(FM) transmitter site. The agents determined that the station's effective radiated power was 68.16 kW, well below its authorized effective radiated power of 100 kW, and identified an area where public

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Response at 3.

<sup>18</sup> See KAOI-FM NAL. This NAL also dismissed the Complaint. *Id.* at ¶22. The Enforcement Bureau issued a Forfeiture Order to Visionary for this violation on February 6, 2007. See *Visionary Related Entertainment, LLC*, Forfeiture Order, 22 FCC Rcd 2271 (EB 2007).

<sup>19</sup> See Objection at 1.

<sup>20</sup> File No. BPH-20080321ADK.

<sup>21</sup> KAOI-FM RFR Statement at 2.

<sup>22</sup> *Letter to John Detz* (Assistant Chief, Audio Division, Apr. 29, 2010).

<sup>23</sup> File No. BRH-20051003CFD. This application was initially granted on February 10, 2006, but was subsequently rescinded upon discovery of the Objection.

<sup>24</sup> Objection at 1.

and occupational RFR MPE limits were exceeded outside the fenced-in site.<sup>25</sup> Agents from the Honolulu Office conducted a follow-up inspection at the site on May 13, 2008, observed that these deficiencies had not been corrected, and again found that both public and occupational RFR MPE limits were exceeded in this area. The agents also interviewed personnel from the neighboring Ulupalakua Ranch and learned that staff from the Ulupalakua Winery were using a building adjacent to the KNUQ(FM) site and that no fence prohibited access to areas at which RFR MPE limits were exceeded.

11. Based upon the violations discovered during its two site inspections, the Honolulu Office issued a Notice of Apparent Liability for Forfeiture to Visionary for violating Section 1.1310 at the KNUQ(FM) site, citing Visionary for exceeding the public RFR MPE limits in an area accessible by the public or by workers who were not fully aware of the potential for exposure, and for failing to take adequate measures to prevent access to an area that exceeded the RFR exposure limits.<sup>26</sup>

12. Visionary also filed an application to relocate and otherwise modify the KNUQ(FM) facilities on June 20, 2008.<sup>27</sup> Subsequently, on June 27, 2008, Visionary requested special temporary authority ("STA") to operate KNUQ(FM) at reduced power.<sup>28</sup> On January 19, 2010, Visionary filed a PTA request and the KNUQ(FM) covering license application for the modified facilities. Visionary submitted an RF Field Strength Measurements report ("KNUQ RF Report") with this application, demonstrating compliance with the Commission's RFR Rules, including photos of visible RFR warning signs and a new fence around the facility. The Audio Division staff granted the PTA request on February 18, 2010.<sup>29</sup>

### III. DISCUSSION

13. *Section 1.1310 Compliance.* Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended ("Act"), provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,<sup>30</sup> which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of

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<sup>25</sup> See *Visionary Related Entertainment, L.L.C.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200832860002 (EB, Western Region, Honolulu Resident Agent Office, June 20, 2008).

<sup>26</sup> *Id.*

<sup>27</sup> See File No. BPH-20080620AJL. The Audio Division granted this application August 29, 2008.

<sup>28</sup> File No. BSTA-20080725AAU. The Audio Division granted the STA request, with an expiration date of January 29, 2009. Visionary filed a timely request for extension of STA on January 26, 2009. See File No. BESTA-20090126AEA. This request was granted on July 29, 2009, and STA was to expire on January 29, 2010. Visionary again filed a timely request for extension of STA on January 14, 2010. See File No. BESTA-20100114ABH. This request was dismissed on February 22, 2010.

<sup>29</sup> See *Letter to John Detz* (Assistant Chief, Audio Division, Feb. 18, 2010).

<sup>30</sup> See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion & Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion & Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

abuse.<sup>31</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application -- after notice and opportunity for a hearing under Section 309(e) of the Act -- or grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted." The plain language and structure of this section clearly establish that the scope of the "violations" listed in Section 309(k)(1) is limited to the station for which license renewal is being considered. Congress has expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which license renewal is sought.<sup>32</sup> We will therefore consider each station individually.

14. KAOI-FM. As noted above, the Enforcement Bureau found during two separate inspections that Visionary's KAOI-FM site was not in compliance with the Rules and issued Visionary a forfeiture for its willful and repeated violation of Section 1.1310.<sup>33</sup> Visionary has since relocated the facilities to a new site,<sup>34</sup> and the Honolulu Office has found Visionary's operations there to be in compliance with Section 1.1310 of the Rules. Upon review of the RF report filed with KAOI-FM's license to cover application, we also find that the station's operations from the new site comply with Section 1.1310.<sup>35</sup>

15. KNUQ(FM). The Enforcement Bureau also found during two separate inspections that Visionary's KNUQ(FM) site was in not in compliance with Section 1.1310, but also determined that Visionary has addressed the prior RFR compliance deficiencies at the KNUQ(FM) site. Based on our review of the KNUQ RF Report, we also find that the site is now in compliance with Section 1.1310 of the Rules. In particular, we note that the measurements shown in the report indicate that RFR levels do not exceed public RFR MPE limits outside the enclosed area, and that within the enclosed area, RFR levels do not exceed the controlled/worker access limits of Section 1.1310. The report also shows that visible RFR warning signs are present.<sup>36</sup> The inclusion of photographs with the report confirms the presence of fencing around the tower.<sup>37</sup> We are therefore satisfied that Visionary has brought the KNUQ(FM) site into compliance with Section 1.1310 of the Rules.

16. *Section 309(k) Analysis*. As noted above, in evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.<sup>38</sup> Specifically, if the licensee fails to meet the applicable standard in Section 309(k)(1), Section 309(k)(2) provides that the Commission may grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."<sup>39</sup>

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<sup>31</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>32</sup> *Sagittarius Broadcasting Corp.*, Memorandum Order & Opinion, 18 FCC Rcd 22551, 22555 (2003).

<sup>33</sup> *Visionary Related Entertainment, LLC*, Forfeiture Order, 22 FCC Rcd 2271 (EB 2007).

<sup>34</sup> *See* File No. BPH-20080321ADK.

<sup>35</sup> *See* File No. BLH-20090410ARC at Exhibit 9.

<sup>36</sup> KNUQ(FM) RF Report at 1.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> 47 U.S.C. § 309(k). *See supra* ¶ 13.

<sup>39</sup> 47 U.S.C. §§ 309(k)(2).

17. It is clear to us that Visionary's conduct has fallen far short of the standard of compliance with the Act and the Rules that would warrant routine license renewal. During their January 26, 2004, inspection of the KAOI-FM site, Commission field agents determined that the station was operating in violation of Section 73.1690(c)(1), and during their subsequent November 17, 2004, inspection, determined that the station was operating in violation of Section 1.1310. The Commission's field agents also determined during their April 9, 2008, and May 13, 2008, inspections of the KNUQ(FM) site that the station was operating in violation of Section 1.1310. The record here shows that Visionary's violations of Section 1.1310 at Stations KAOI-FM and KNUQ(FM) were "serious" violations.<sup>40</sup> The record here further indicates that the violations of various Rules at Station KAOI-FM, when considered together, constituted a pattern of abuse over a period of years by Visionary at that station.<sup>41</sup> Likewise, the violations at Station KNUQ(FM), when considered together, constituted a pattern of abuse over a period of years by Visionary at the station.<sup>42</sup> However, we find that Visionary's violations of the Act and the Rules does not rise to such a level that designation for evidentiary hearing on the issue of whether to deny renewal for either station is warranted. Importantly, the record establishes that Visionary has brought both transmitter sites into compliance with the Rules.<sup>43</sup> Additionally, Visionary has paid the forfeitures assessed against both Stations KAOI-FM and KNUQ(FM).

18. Nevertheless, we believe that additional measures are necessary in order to ensure that the stations are operated in compliance with the Act and the Rules in the future. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant the renewal applications, provided that the new license terms will be limited to a period of twelve (12) months from the release date of this Order.<sup>44</sup> This limited

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<sup>40</sup> See 47 U.S.C. § 309(k)(1)(B). The Commission places great emphasis on licensees' compliance with safety and health regulations. See, e.g., *Infinity Broadcasting Corporation of Florida*, Order on Review, 24 FCC Rcd 4270 (2009) (affirming a \$10,000 forfeiture order issue for violation of Section 1.1310); *A-O Broadcasting Corporation*, Memorandum Opinion and Order, 20 FCC Rcd 756 (2005) (affirming a \$25,000 forfeiture order for violations of numerous safety regulations, including Section 1.1310). See also, *Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123, 15135 (1996) ("We believe that the exposure criteria we are adopting will protect workers and the general public from potentially harmful RF emissions due to FCC-regulated transmitters."), *recon. granted in part, First Memorandum Opinion and Order*, 11 FCC Rcd 17512 (1996), *recon. granted in part, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494 (1997).

<sup>41</sup> See 47 U.S.C. § 309(k)(1)(C).

<sup>42</sup> *Id.*

<sup>43</sup> Based on this recent record of compliance, we do not find that Visionary's operation of the stations "was conducted in an exceedingly careless, inept and negligent manner and that the Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the stations] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.* at 200.

<sup>44</sup> See *South Seas Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal granted, NAL issued, for willfully and repeatedly violating 47 C.F.R. § 73.1350 by engaging in operation of the Station at an unauthorized site and willfully and repeatedly violating 47 C.F.R. § 73.1740 by leaving the Station silent without the proper authorization); *Enid Public Radio Association*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 9138, 9144 (MB 2010) (six-year renewal granted, NAL issued, after finding a pattern of abuse where "'the number, nature and extent' of the violations on the record, coupled with Licensee's apparent disregard for a prior admonition regarding those violations and refusal to address the allegations, indicate that 'the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules.'").

renewal period will afford the Commission an opportunity to review the stations' compliance with the Act and the Rules and to take whatever corrective actions, if any, that may be warranted at that time. Additionally, notwithstanding Visionary's implementation of corrective measures to bring the stations into compliance with Section 1.1310 of the Rules, the Enforcement Bureau believes it would be appropriate to require Visionary to implement an employee training program on RFR compliance. Accordingly, we are imposing such a condition on the grant of the stations' license renewal applications.

19. We have evaluated the KAOI-FM and KNUQ(FM) renewal applications pursuant to Section 309(k) of the Act, and we find that each station has served the public interest, convenience, and necessity during the subject license term. However, for the reasons described above, we find that the Objectors presented showings of serious violations of our Rules, and a pattern of abuse of our Rules, by Visionary in the preceding license term, warranting short-term license renewals pursuant to Section 309(k)(2) of the Act.

#### IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, that the January 26, 2006, informal objection of D.T. Fleming Arboretum and Martha Vockrodt-Moran IS GRANTED TO THE EXTENT INDICATED HEREIN, and IS OTHERWISE DENIED.

21. IT IS FURTHER ORDERED that the license renewal application (BRH-20051003CFK) for Station KAOI-FM, Wailuku, Hawaii, and the license renewal application (BRH-20051003CFD) for Station KNUQ(FM), Paauilo, Hawaii, ARE GRANTED for a period of twelve (12) months from the date of the release of this Order,<sup>45</sup> subject to the condition that, within thirty (30) days from the of the release of this Order, Visionary Related Entertainment, LLC, conduct training for all employees, agents, and contractors of Stations KAOI-FM and KNUQ(FM) whose job responsibilities require and/or may result in their presence at or near the stations' transmitter sites, regarding the hazards of exposure to radio frequency radiation in controlled environments, as well as the requirement to post appropriate warning signs. Visionary Related Entertainment, LLC, shall videotape this workshop and, for the duration of the Stations' license renewal period, use it to train any new station employee within five (5) days of commencement of his/her duties at the stations. Within thirty (30) days of conducting this workshop, Visionary Related Entertainment, LLC, shall certify that it has complied with this condition. A copy of the workshop video must be mailed to the Federal Communications Commission, Audio Division, Media Bureau, attn. Peter Doyle, 445 12<sup>th</sup> Street SW, Washington, D.C. 20554, and, if in electronic form the video is less than 10 MB, emailed to WR-Response@fcc.gov, or if more than 10 MB, mail a copy to the Federal Communications Commission, Enforcement Bureau, attn. Western Region Director, 215 South Wadsworth Blvd., Suite 303, Lakewood, CO 80226.

22. IT IS FURTHER ORDERED that the application for license to cover (BLH-20090410ARC) for Station KAOI-FM, Wailuku, Hawaii, and the application for license to cover (BLH-20100119AAO) for Station KNUQ(FM), Paauilo, Hawaii, ARE GRANTED.

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<sup>45</sup> Licensee is required to comply with the pre-filing requirements of Section 73.3580 of the Rules, which specifies when a broadcast licensee filing a renewal application must air announcement regarding its renewal application. 47 C.F.R. § 73.3580(d)(4)(i). Because the stations' renewal terms will expire in February 2013, Visionary must begin airing a pre-filing announcement in August 2012.

23. IT IS FURTHER ORDERED that copies of this Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Visionary Related Entertainment, LLC, P.O. Box 1730, Rohnert Park, CA 94927; to its counsel, Lawrence Miller, Esq., Schwartz, Woods & Miller, 1233 20<sup>th</sup> Street, N.W., Suite 610, Washington, DC 20036-7322; and to Ms. Martha Vockrodt-Moran, D.T. Fleming Arboretum, P.O. Box 101, Makawao, Maui, HI 96768.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake, Chief  
Media Bureau